FILE COPY

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1935.

No. 664.

J. W. Tipton,

Petitioner,

vs.

Atchison, Topeka & Santa Fe Railway Company (a corporation),

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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I.

The Petition for Certiorari Does Not Disclose That This Case Is One of Such Peculiar Gravity and General Importance as to Require a Review by This Court of the Decision of the Circuit Court of Appeals Herein, nor Does It Appear That There is a Conflict of Decisions Concerning the Statutes Involved.

Petitioner's statement of the case is in error in reciting that petitioner's complaint alleged that petitioner was injured while in the employ of the Southern Pacific Com-

pany, a corporation. The complaint alleged and the fact is that the petitioner at the time of his alleged injury was in the employ of respondent, The Atchison, Topeka and Santa Fe Railway Company, a corporation.

In the courts below petitioner presented his complaint and his appeal upon the theory that, despite the fact that at the time of his alleged injury he was not engaged in interstate commerce and therefore not within the influence of the Act of Congress commonly referred to as the Federal Employers Liability Act, nevertheless he was entitled to maintain an action for damages against his employer by reason of an alleged violation of the Federal Safety Appliance Act. No reference was made in either of the courts below to any claim that he had a right to sue for damages under any California statute. It is indeed strikingly singular that upon this petition for certiorari petitioner abandons the grounds heretofore urged in the courts below and presents to this court an entirely different question. According to the petition the question presented to this court is whether or not an employee in California, not engaged in interstate commerce, is remitted to his rights under the California Workmen's Compensation Act, or whether he has a right to sue for damages under any California statute.

Article 22, Section 21, of the California Constitution as amended November 5, 1918, vested in the State Legislature plenary and unlimited power to create and enforce a complete system of workmen's compensation, to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability irrespective of the fault of any party. Pursuant to this Constitutional mandate the California State

Legislature enacted Act 4749 of the General Laws which at the time of the happening of the accident complained of contained the following pertinent provisions:

> "Sec. 6. *Employer's Liability.* (a) Liability for the compensation provided by this act *in lieu of any other liability whatsoever to any person shall* without regard to negligence exist against an employer for any injury sustained by his employees arising out of and in the course of the employment. * * *
>
> "Sec. 7. *Employer Defined.* The term 'employer' as used in Section 6, etc., shall be construed to mean * * * every person, firm, voluntary association and private corporation, including any public service corporation, who has any person in service under any appointment or contract of hire, express or implied, oral or written. * * *"

The Act provides for the establishment of an industrial accident commission for the making of claims, holding of hearings, taking of evidence, and making of awards and enforcement thereof. Section 69 of the Act provides:

> "(a) Whenever this act or any part or section thereof is interpreted by a court, it shall be liberally construed by such court with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment.
>
> * * * * * * * * *
>
> "(c) *Employers Engaged in Interstate Commerce.* This act shall not be construed to apply to employers or employments which according to law are so engaged in interstate commerce as not to be subject to the legislative power of the state *or to employees injured while they are so engaged* except insofar as

this act may be permitted to apply under the provisions of the Constitution of the United States or the acts of Congress."

The Constitutional amendment and State law have been construed many times by the Supreme Court of the State of California and this Honorable Court.

In *Bartlett Hayward Co. v. Industrial Accident Commission,* 203 Cal. 522, 528, the Supreme Court of California said:

> "It (the amendment to the California Constitution) enabled the legislature to deprive the trial courts of the state of jurisdiction over such disputes (between employer and employee) and to deny to the employee the right to a jury trial."

In *Cooper v. Industrial Accident Commission,* 177 Cal. 685, the Supreme Court of California, at page 687, said:

> "The obvious intent of the act was to substitute its procedure for the former method of settling disputes between * * * master and servant, or employer and employee, by means of actions for damages * * *; and with the uncertainties or inequities incident to jury trials."

In *Western Indemnity Co. v. Pillsbury,* 170 Cal. 686, page 692, the Supreme Court of California employed the following pertinent language:

> "The enactment substitutes a new system of rights and obligations for the common-law rules governing the liability of employers for injuries to their workmen. The change thus made is radical, not to say revolutionary. In place of the old action, in which the employer was liable only if he, or some one repre-

senting him, had been guilty of negligence or misconduct, the new law imposes upon the employer a liability for any accidental injuries to his employees arising out of the employment—a liability not conditioned upon any negligence of the employer, or any want of negligence on the part of the employee. All that is required is that the injury shall not have been caused by the intoxication or the wilful misconduct of the injured employee. Stating the change another way, the long established doctrines of contributory negligence, of assumption of risk and of negligence of a fellow-servant are by this law swept out of existence, and are given no weight in proceedings by employees against employers on account of injuries received in the employment. * * *"

In *Dominguez v. Pendola*, 46 Cal. App. 220, the California court said at page 224:

"It is asserted that the act is unconstitutional because it divests an injured employee, or the representatives of a deceased employee of the right of trial by jury in violation of Section 7, Article I, of the Constitution of this state; that the act is also unconstitutional because it deprives the superior courts of this state of the jurisdiction conferred upon them by Section 5, Article VI, of the Constitution.

"While these precise points were not urged, apparently, in the case of Western Indemnity Co. v. Pillsbury, 170 Cal. 686 (151 Pac. 398), the court in that case commented upon the objection raised in other states that similar acts were unconstitutional because they deprived both employer and employee of the right to trial by jury, saying that this objection had no application to the law in this state, 'for although our constitution has always contained a provision

securing the right of trial by jury (Art. I, Sec. 7), the legislature is, as we have already pointed out, expressly authorized by section 21 of Article XX to provide for the settlement by arbitration, by a board, or by the courts, of disputes involving the liability of employers. This section, adopted in 1911, worked a repeal *pro tanto,* of any conflicting provision which may have been in force theretofore.' The language above quoted in connection with the language of sections 17½ and 21 of Article XX of the Constitution of California is a complete answer to both contentions of the appellant upon this question.

In *Treat v. Los Angeles Gas & Electric Corp.,* 60 Cal. App. 466, at page 467, the California court elaborates the principle as follows:

"It is provided in paragraph (a) of section 6 of the Compensation Act, italics being ours, that upon the concurrence of several conditions which need not now be specified, 'Liability for the compensation provided by this act, *in lieu of any other liability whatsoever to any person,* shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any such employee if the injury shall proximately cause death. * * *'" (Italics are those of the court quoted.)

In *DeCarli v. Associated Oil Co.,* 57 Cal. App. 310, the California court said at page 311:

"The remedy here provided for has been held to be exclusive of all other statutory or common-law remedies, and the constitutionality of the provision has been upheld in numerous cases. (E. Clemens Horst

> Co. v. Industrial Acc. Com., 184 Cal. 180 (16 A. L. R. 611, 193 Pac. 105.) See, also, Western Metal Supply Co. v. Pillsbury, 172 Cal. 407 (Ann. Cas. 1917E, 390, 156 Pac. 491); San Francisco Stevedoring Co. v. Pillsbury, 170 Cal. 321 (149 Pac. 586); Dominquez v. Pendola, 46 Cal. App. 220 (188 Pac. 1025); Helme v. Great Western Milling Co., 43 Cal. App. 416 (185 Pac. 510).) As pointed out in these cases the constitution authorizes a complete system of workmen's compensation, and the language employed is comprehensive enough and was intended to include all injuries, irrespective of the manner in which they might occur."

In addition to the foregoing, Section 69 (c) of the California Workmen's Compensation Act itself provides as the only exception that it will not apply to employees injured while they are engaged in interstate commerce so as not to be subject to the legislative power of the state. There is no contention here that petitioner was engaged in interstate commerce at the time of his alleged injury and therefore his case is not within the exemption in the statute.

This court in the case of *Industrial Accident Commission of the State of California and O. J. Burton, Petitioners, v. James C. Davis, etc.*, 259 U. S. 182, 66 L. Ed. 889, held that unless an employee of a railroad was engaged in interstate transportation at the time of his injury, or work so closely related to it as to be practically a part of it, his relation with his employer would be governed by the applicable state statute. To the same effect are *Ill. C. R. Co. v. Behrens*, 233 U. S. 473, 58 L. Ed. 1051, 34 supreme Ct. Rep. 646; *Erie v. Welch*, 242 U. S. 303, 61 L. Ed. 319, 37 Supreme Ct. Rep. 116; *Southern Pa-*

cific v. Industrial Accident Commission, 251 U. S. 259, 64 L. Ed. 258, 40 Supreme Ct. Rep. 130.

It is further significant that the petition does not enlighten this court as to any California statutes under which it is claimed petitioner has a right to sue his employer for damages. The petition is wholly devoid of any suggestion or reference to any California statute affecting the relationship of master and servant other than the California Workmen's Compensation Act. The petition therefore wholly fails to set forth any justiciable question to be decided by this court.

II.

The Decision of the Circuit Court of Appeals in This Case Is Not in Conflict With Any Decisions of Either State or Federal Courts Concerning the California Workmen's Compensation Act.

We understand that this court will invoke its power to review a judgment of a Circuit Court of Appeals only on the ground of a conflict of decisions when the conflict involves some particular statute. So far as we have been able to ascertain there is no conflict, either of state or federal courts, in any construction of the California Workmen's Compensation Act. It is not claimed nor is it shown in the petition wherein any California statute purports to give to petitioner herein any right to sue his employer for damages, or any statute purporting to place petitioner's case in any other category than that covered by the California Workmen's Compensation Act.

Petitioner claims that the decision of the court below conflicts with the decision in *Ross v. Schooley,* 257 Fed. 290, and *Director General v. Ronald,* 265 Fed. 138. These

decisions follow *Texas & Pacific R. Co. v. Rigsby*, 241 U. S. 43. These decisions of the Federal Circuit Courts were prior to the decisions by this court in the cases of *Moore v. Chesapeake & Ohio R. Co.*, 291 U. S. 205, and *Gilvary v. Cuyahoga Valley R. Co.*, 292 U. S. 57. At this point we parenthetically remark that counsel for petitioner again confuses the question presented here. The cases cited in the petition purport to hold that the Federal Safety Appliance Act in and of itself would give to the petitioner a right of action against his employer even though he was not engaged in the furtherance of interstate transportation at the time of his alleged injury. They are not and can not be authority for the point contended for here by petitioner, namely, that the California state statute gives him the right to maintain his alleged cause of action. Furthermore, they were overruled by the *Moore* and *Gilvary* cases, *supra*.

Petitioner places too much reliance on the case of *Ballard v. Sacramento Northern R.*, 126 Cal. App. 486, decided by the Third District Court of Appeal of the State of California (not the Supreme Court of the State of California), and the case of *Walton v. Southern Pacific Co.*, 48 Pac. (2) 108, decided by the First District Court of Appeal of the State of California. Petitioner insists that these two decisions recognize his right to maintain the instant action under some totally unidentified so-called "applicable state statute."

In order wholly to refute the contention of petitioner we point out that the *Ballard* case was decided before the decisions of this court in the cases of *Moore v. C. & O. R. Co.*, *supra*, and *Gilvary v. Cuyahoga V. R. Co.*, *supra*. In order that it may clearly appear that the District Court

of Appeal of the state of California entirely misapprehended the force and effect of Article 69(c) of the California Workmen's Compensation Act, *supra,* we quote all of the language used by the District Court of Appeal of California dealing with the subject:

> "The contention that the Workmen's Compensation Act applies, we think is without merit. In Smithson etc. v. Atchison, T. & S. F. Ry. Co., 174 Cal. 148 (162 Pac. 111), in speaking of the Federal Employees' Liability Act, which corresponds in force and effect with the Safety Appliance Act, the Supreme Court said, quoting from the syllabus: 'In actions brought in state courts, under the provisions of the Federal Employees' Liability Act approved April 22, 1908, the decisions of the Supreme Court of the United States are controlling in the construction of the act.' Here, jurisdiction to try cases based upon the Federal Safety Appliance Act is vested in district and superior courts. By subdivision "C" of Section 69 of the Workmen's Compensation Act, it is expressly provided that where interstate commerce questions are presented, resort to the courts is not prohibited. We do not need to review the testimony showing that interstate commerce is carried on over the lines of the defendant, further than to state it is sufficient to establish such character, and the record shows that the defendant practically admitted such character in the trial court. Under the Safety Appliance Act, it is the absolute duty of the carrier to maintain the several parts of the braking appliances in such condition that they may be safely operated. (Armitage v. Chicago, M. & St. P. Ry. Co., 54 Mont. 38 (166 Pac. 301); LaMere v. Railway Transfer Co.,

125 Minn. 159 (Ann. Cas. 1915C, 667, 145 N. W. 1058).)'

"In the case of Lockhart v. Southern Pac. Co., 91 Cal. App. 770 (267 Pac. 591), the Safety Appliance Act was not involved. The cause was prosecuted under the Federal Employees' Liability Act, and it was not shown that the car upon which the injured workman was engaged was, or ever had been employed in interstate commerce. The same may be said of the case of Johnson v. Southern Pac. Co., 199 Cal. 126 (49 A. L. R. 1323, 248 Pac. 501).

"We do not need to cite the long list of authorities holding that violation of the Safety Appliance Act constitutes negligence. One case only needs to be referred to: Spokane & Inland Ry. Co. v. Campbell, 241 U. S. at page 509 (60 L. Ed. 1125, 36 Sup. Ct. Rep. 683.)"

The only language used by the District Court of Appeal of California in the *Walton* case, *supra*, touching upon the point involved, is as follows:

"Under the authority of Ballard v. Sacramento Northern Railway Company, 126 Cal. App. 486, the instant suit is maintainable."

It will be readily seen from the above quotations that the case of *Ballard v. Sacramento Northern Railway Company, supra,* was decided by the California District Court of Appeal upon the erroneous assumption that the Federal Safety Appliance Act itself created a cause of action. That court held that the Workmen's Compensation Act of California did not apply to the case of an

employe injured while engaged in intrastate commerce for the reason that it believed (according to the then existing decisions) that there was a right of action given to the petitioner by the terms of the Safety Appliance Act itself. This court, in the *Moore* and *Gilvary* cases, *supra,* has ruled exactly to the contrary. The *Ballard* case did not interpret the California Workmen's Compensation Act but attempted to interpret the Federal Safety Appliance Act. The District Court of Appeal in the *Walton* case blindly followed the *Ballard* case without analyzing it and without giving proper consideration to the legal principles involved.

Petitioner herein cites the *Walton* and *Ballard* cases in support of his argument that they are California determinations of California law by California District Courts of Appeal and are therefore binding upon this court. As we have shown, however, each of these cases attempted to interpret the Federal Safety Appliance Act and of course such interpretations are not binding upon this court. We submit that they are erroneous. They are not the law, and are not correct interpretations of the Federal Safety Appliance Act. It will therefore be seen that inasmuch as this court and the California courts have repeatedly held that an employe can not sue his employer, but in case of injury is remitted to his rights under the California Workmen's Compensation Act, the decision of the Circuit Court of Appeals in the case below correctly interpreted the California law.

In view of the fact that the Supreme Court of California (the highest court of the state), in the case of *Alaska Packers Association v. Industrial Accident Commission*, 200 Cal. 579, 253 Pac. 956, stated in unequivocal language, "The California Workmen's Compensation Act provides the *only means* by which an injured employe can recover compensation from his employer for injuries received in the course of and arising out of his employment and it abrogates the common law liability of the master," it is apparent beyond peradventure of doubt that there is no general California statute giving petitioner any right of action for damages under the facts alleged in the complaint herein. There is no common law right of action in California whereby an employe can sue his employer for damages on account of injuries sustained during the course of the employment. There is no statute in California governing the relations of master and servant with respect to injuries or death other than the California Workmen's Compensation Act. This Court has held that the Federal Safety Appliance Act in and of itself gives an employe no right of action. The Federal Employers Liability Act does not touch the instant case inasmuch as petitioner was not engaged in interstate commerce. All of applicant's rights are defined by the California Workmen's Compensation Insurance and Safety Act. The decision of the court below strictly and carefully followed the law as laid down by this Court and the Supreme Court of the state of California.

In conclusion we respectfully submit that the exigencies of this case are not of such importance as to require this Court to grant a writ of certiorari, nor are the decisions of the federal courts or the state courts concerning the statute in question in conflict with the decision of the Circuit Court of Appeals in this case. For these reasons the petition for certiorari should be denied.

Respectfully submitted,

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